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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

(SAN JOSE)

UNITED STATES OF AMERICA and STATE OF CALIFORNIA, *ex rel.* VINCENT HASCOET and PHILIPPE PACAUD DESBOIS, Plaintiffs, vs. MORPHO, S.A., a/k/a SAFRAN IDENTITY & SECURITY, S.A., a French corporation; et al. Defendants.	* Case No. 5:15-cv-00746-LHK * * **RELATORS' POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS RELATORS' THIRD AMENDED COMPLAINT PURSUANT TO FRCP 12(b)(1) AND 12(b)(6)** * * * Hearing: August 24, 2017 * Hearing Time: 1:30 P.M. * Courtroom: Eight * Judge: Hon. Lucy H. Koh * United States District Judge

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INTRODUCTION

This is the brief of Relator Vincent Hascoet and Philippe Pacaud Desbois in opposition to Defendants' motion to dismiss Relators' Third Amended Complaint.

SUMMARY OF ARGUMENT

(1) Relators' Third Amended Complaint Sufficiently States Indirect Sales to the United States and the State of California, Sufficient to Satisfy Rule 12(b)(1)

(2) Relators' Third Amended Complaint Sufficiently States a Cause of Action under Rule 12(b)(6), in that Indirect Sales Are Actionable Pursuant to the 2009 FERA amendments to the False Claims Act.

(3) Relators' Third Amended Complaint Sufficiently Apprises Defendants of the Fraud of Which They Are Accused, So As to Comply with the Letter and Spirit of Rule 9(b), in as applied by Ninth Circuit standard set forth in *Ebeid*..

(4) Defendants File Zero Evidence that the False Claims Alleged in this Lawsuit Were Publicly Disclosed Prior to the Unsealing of Relators' Qui Tam Case.

(5) Relators' TAC Sufficiently Pleads Scienter by Defendants.

ARGUMENT

I. THE FALSE CLAIMS ACT.

The False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, is the government's primary weapon to prevent fraud against the government. The FCA, known as "Lincoln's Law" (after President Lincoln), was enacted in 1863 by a Congress concerned that suppliers of goods to the Union Army during the Civil War were defrauding the Army. The FCA generally prohibits a person from knowingly presenting or causing to be presented to the government a false claim for payment or approval, or knowingly making or causing to be made a false record or statement material to a false claim. 31 U.S.C. § 3729(a)(1).

Lawsuits to enforce the FCA may asserted directly by the Department of Justice (DOJ) or by private citizens known as qui tam plaintiffs or "relators," who stand to receive a 15% to 30%

share in any recovery by the government. 31 U.S.C. § 3730(b). The FCA provides for treble damages recovery on behalf of the government, plus statutory penalties per violation ranging from $10,781 to $21,563. 81 Fed. Reg. 42491 (June 30, 2016).

The FCA prohibits qui tam actions by a relator based on public disclosure of the alleged fraud unless the relator was the "original source" of the public disclosure. The purpose of such provision is to prevent parasitic qui tam lawsuits based on stale information.

Although the FCA requires DOJ to investigate all alleged violations (31 U.S.C. § 3730(a)), a civil action under the FCA may be brought either by the United States or, as here, a *qui tam* action by one or more relators in a private action. *Id.* § 3730(a) and (b). In a case brought by a relator, the DOJ has the option of electing to intervene. A declination to intervene is no reflection on the merit of a case, and in fact the vast majority (80%) of *qui tam* cases do not result in intervention. *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, "Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement" (June 7, 2012), http://www.justice.gov/iso/opa/ civil/speeches/2012/civ-speech-1206071.html.

In 1999, U.S. Congressman Howard Berman, one of the two sponsors of the 1986 Amendments to the FCA, declared:

> One of the principal goals of the 1986 Amendments was to ameliorate the "lack of resources on the part of Federal enforcement agencies." S. Rep. 99-345 at 7. That was one of the reasons we strengthened the qui tam provisions of the law. Thus, **we expected some meritorious cases to proceed without the Government's intervention, and we fully expected that the Government and relators would work together in many cases to achieve a just result.** By dismissing relators based on spurious interpretations of the [FCA], the courts are depriving the Government of these additional resources. And those resources have been considerable.

See 106 Cong. Rec. E1546-E1548 (1999) (statement of Rep. Berman) (emphasis added).

On May 20, 2009, President Obama signed the Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub.L. 111–21, S. 386, 123 Stat. 1617, which substantially amended the FCA for the first time since 1986. Those amendments significantly expanded the scope of liability for individuals and entities that receive government funds. The most significant aspect of FERA is that it expanded potential liability under the FCA to any person or entity that makes a false

statement or claim to a *recipient* of federal funds –*.i.e.*, claims directly to the government is not required – liability attaches not only to sales directly to the United States, but also to sales to contractors, subsidiaries, and other intermediaries receiving federal funds.

More than 9,000 qui tam actions have been filed. In fact, over one recent five-year period (2008-2013) alone, more than 3,000 lawsuits were filed, and $20 billion was recovered. These numbers rival or even eclipse securities and antitrust in annual filings and recoveries. *See* David Freeman Engstrom, Private Enforcement's Pathways: Lessons From Qui Tam Litigation, 114 Colum. L. Rev. 1913, 1944 (2014). The United States obtained nearly $3.6 billion in civil settlements and judgments under the FCA during the 2015 Fiscal Year. *See* Press Release, Office of Public Affairs, United States Department of Justice, "Justice Department Recovers Over $3.5 Billion from False Claims Act Cases in Fiscal Year 2015" (Dec. 3, 2015), http://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion. This marks the sixth year in a row in which total recoveries in FCA matters exceeded $3 billion. *Id.*

Pursuant to the court's supplemental jurisdiction, Relators allege causes of action on behalf of the State of California pursuant to the California False Claims Act ("CFCA"), Cal. Gov. C. §§ 12650, et seq. The CFCA was enacted in 1987 to establish a cause of action for false claims for payment submitted to the State of California and its political subdivisions. The CFCA was modeled after the 1986 amended version of the federal False Claims Act, and is very similar to the federal FCA. The CFCA was amended effective January 1, 2013, to match changes to the FCA between 2009 and 2010.

In June, 2016, the U.S. Supreme Court unanimously validated the "implied certification" theory of FCA liability. According to that theory, when a defendant submits a claim for payment to the government, it impliedly certifies compliance with various regulatory, statutory, and contractual requirements that otherwise apply to it. The theory holds that noncompliance with one of those separate requirements renders the claim "false" even if the defendant actually provided the government the good or service and made no explicit false statement. *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016).

II. DEFENDANTS CITE *ZERO* EVIDENCE OF PUBLIC DISCLOSURE OF THE FALSE CLAIM ABOUT COUNTRY OF ORIGIN OF MORPHO'S FINGER-PRINT IDENTIFICATION TECHNOLOGY, ABOUT THE UNLAWFUL AGREEMENT NOT TO COMPETE IN THE U.S. MARKET, AND ABOUT DEFENDANTS' FALSE CERTIFICATION OF COMPLIANCE WITH THE TRADE AGREEMENTS ACT OF 1979.

Defendants, in their brief, boldly represent to the Court that Relators' false claims allegations are "taken directly from publicly available websites and industry materials." (Def. Brief, 2:17-18, 22:6-24:6.) *Such representation to the Court is false and misleading* – Defendants fail to – and indeed cannot – cite even one word instance of public disclosure, prior to the filing of this lawsuit, of the false claims alleged by Relators in this case, including, but not limited to, Defendants' concealment of the country of origin of the technology in their fingerprint identification products sold to the United States and to the State of California, Defendants' false certification of compliance with antitrust laws prohibiting an agreement not to compete in the U.S. market, and Defendants' false certification of compliance with The Trade Agreements Act of 1979 ("TAA"), 19 U.S.C. §§ 2501–2581.

Notwithstanding nearly a year having passed since this case was unsealed, Defendants have not produced to the Court a single contract, a single news article, a single website, or a single declaration publicly disclosing that the country of origin of Defendants' fingerprint identification equipment technology was France rather than Russia; that Defendants had in place an non-competition agreement with Papillon ZAO, barring Papillon ZAO from competing for business in the United States; or that Defendants' certification of compliance with The Trade Agreements Act of 1979 was false.

Rather, as if throwing so much jello against the wall to see if something might stick, Defendants cite to the Court a myriad of publicly available disclosures about *non-lie* issues, such as news stories and websites about officers, sales, and the like (Def. Brf. 22:4-24:6). Not a single one of the subject documents contains a disclosure of the acts of fraudulent concealment and false certification alleged by Relators in this case. Defendants' allegations of pre-existing public

disclosure are all talk and no substance – red herrings calculated to distract the court away from the issue of whether the "lies" at issue in this case were ever publicly known prior to this lawsuit. *The plain truth is that they absolutely were not publicly disclosed prior to the filing of this qui tam lawsuit by Relators.*.

III. RELATORS, IN HIGH-LEVEL POSITIONS OF MANAGEMENT AND INTERNAL COMPLIANCE WITHIN SAFRAN ARE ORIGINAL SOURCES.

Relators's set forth in their TAC how they, as high executives within the Safran corporate structure, are original sources in regard to Defendants' false claim regarding country of origin of technology they sold. Vincent Hascoet and Philippe Pacaud Desbois are *not* opportunistic parasites who read about Defendants' *lie* in a news story. (TAC 5-8.)

The Patient Protection and Affordable Care Act ("PPACA"), P.L. 111-148, modified the standard for a relator to qualify as an "original source." Rather than requiring the relator to have "direct and independent knowledge" of the alleged fraud, the PPACA eliminated the "direct" knowledge requirement, and instead required "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." 31 U.S.C. § 3730(e)(4)(C).

IV. RELATORS' THIRD AMENDED COMPLAINT ALLEGATIONS OF FRAUD SATISFY THE *EBEID* TEST OF BEING "SPECIFIC ENOUGH TO GIVE DEFENDANTS NOTICE OF THE PARTICULAR MISCONDUCT WHICH IS ALLEGED TO CONSTITUTE THE FRAUD CHARGED SO THAT THEY CAN DEFEND AGAINST THE CHARGE AND NOT JUST DENY THAT THEY HAVE DONE ANYTHING WRONG."

Because it is an anti-fraud statute, an action brought under the FCA must satisfy the particularity requirements of Fed.R.Civ.P. 9(b) ("Rule 9(b)"). *Bly-Magee v. Cal.*, 236 F.3d 1014, 1018 (9th Cir. 2001).

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a party's pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.

Civ.P. 8(a)(2). However, Rule 9(b) requires that, when fraud is alleged, "a party must state with particularity the circumstances constituting fraud " Fed.R.Civ.P. 9(b).

Rule 9(b) does not eliminate the Rule 8 requirements. *Viacom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 776 (7th Cir. 1994). Considering Rule 8 and 9(b) together "underscore(s) the emphasis placed on clarity and brevity by the federal pleading rules." See Allan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1217 (2d ed. 1990).

The essential elements of FCA liability are (1) a false statement (or fraudulent course of conduct), (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due. *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006), *cert. denied*, 550 U.S. 930 (2007).

Rule 9(b) requires only that the *circumstances* of fraud be stated with particularity; other facts may be pled generally, or in accordance with Rule 8. It is sufficient to allege **"particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."** (Emphasis supplied.) *Ebeid ex rel. U.S. v. Lungwitz*, 161 F.3d 993, 998-999 (9th Cir. 2010), cert. denied, 131 S. Ct. 801 (2010).

A relator must provide enough detail to give the defendant notice of the particular misconduct which is alleged to constitute the fraud charged so that the defendant can defend against the charge and not just deny that they have done anything wrong. *Id.* The relator must also supply reasonable indicia that false claims were actually submitted. *Id.* The complaint must refer to the statute, rule, regulation, or contract that conditions payment on compliance with FDA regulations of drug production. *Id.* at 1000. Under Rule 9(b), allegations must include details and facts setting out the "who, what, when, where, and how." *Id.* To comply with Rule 9(b), allegations of fraud must be **"specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong."** *Id.* at 1019 (Citation omitted) (Emphasis supplied.)

In the typical FCA *qui tam* action, such as where a private company overcharges the United States under a government contract, the claim for payment is literally false or fraudulent.

United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996). Congress, however, has emphasized that the FCA should be broadly construed "to reach all types of fraud . . . that might result in financial loss to the [g]overnment." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968).

Thus, courts have ruled that the FCA does not limit liability to facially false or fraudulent claims for payment. Rather, the "broad construction of a 'false or fraudulent claim' [has] given rise to two doctrines that attach potential [FCA] liability to claims for payment that are not explicitly and/or independently false: (1) false certification (either express or implied); and (2) promissory fraud." *Hendow, supra,* 461 F.3d at 1171.

Relators plead their qui tam case with extraordinary particularity, by far satisfying both Rule 8 and Rule 9(b). The purpose of Rule 9(b) being to ensure that an accused defendant is made sufficiently aware of the wrong of which he is being accused, there is no doubt that Safran and Morpho know full well the wrong of which they are being accused. Any contrary contention is tongue-in-cheek.

Defendants' allegation, in Defendants' brief (Doc. 85-1, 1:20-2:5), that Relators fail to state the "what, who, when, where, and how" in regard to the fraud on the government is nothing more than a conclusionary statement, without any explanation as to the specific alleged deficiency. That is because there is *no* such pleading deficiency – Relators' revised TAC amply satisfies the "what, who, when, where, and how" requirement set forth in *Ebeid, supra,* 161 F.3d at 1000.

In *U.S. ex rel. Driscoll v. Todd Spencer M.D. Medical Group, Inc.*, No. 13-17624, 2016 WL 4191896 (9th Cir. Aug. 9, 2016), the Ninth Circuit applied *Ebeid*. In *Driscoll*, the Ninth Circuit reversed the dismissal of relator Driscoll's complaint, holding that because certain of his claims were pled with the particularity required by Rule 9(b), he should be permitted to amend his complaint to address its deficiencies and narrow its scope. Driscoll alleged that defendants (1) conducted unnecessary CT scans and (2) "'unbundled' procedures in order to increase billings artificially." Driscoll provided detailed examples of the alleged misconduct, including dates and accounts of misconduct that he personally observed. Accordingly, the Court reasoned that the

allegations were not based on speculation, but were "sufficiently specific" to allow defendants to answer them and state a defense.

In *United States v. United Healthcare Insurance Co., et al.*, 832 F.3d 1084 (9th Cir. Aug. 10, 2016), amended at No. 13-56746, 2016 WL 7378731 (9th Cir. Dec. 16, 2016), relator Swoben alleged that various Medicare Advantage organizations and a physician group submitted false certifications of the accuracy of patient diagnosis codes in order to increase Medicare payments based on patient risk profiles. Specifically, Swoben alleged that defendants structured a retrospective review of medical records that "identif[ied] and report[ed] only under-reported diagnosis codes . . . not over-reported codes." In other words, defendants allegedly crafted a review of medical records that "deliberately . . . avoid[ed]" the identification of improperly submitted diagnosis codes. The Ninth Circuit held that Swoben's allegations satisfied Rule 9(b) because they alleged "the who, what, when, where, and how of the misconduct charged." Specifically, Swoben provided the dates of the retrospective reviews, the type of software used for the reviews, and the dates the defendants used the reviews to report results to CMS. Despite Swoben's failure to "describe any specific instances of falsity," the Court held that Swoben had alleged "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." **The Court also held that Swoben's failure to differentiate between defendants and allege separate allegations for each did not contravene Rule 9(b): "There is no flaw in a pleading, . . . where, as here, collective allegations are used to describe the actions of multiple defendants who are alleged to have engaged in precisely the same conduct."**

V. RELATORS' THIRD AMENDED COMPLAINT SATISFACTORILY PLEADS THEY HAVE PERSONAL KNOWLEDGE OF DEFENDANTS' ALLEGED FRAUDULENT SCHEMES, INCLUDING THE ROLE OF SAFRAN U.S.A., INC.

A. The Public Disclosure Bar.

Under the FCA, the "public disclosure" bar precludes qui tam suits where there has been a public disclosure of the fraud, unless the whistleblower qualifies as an "original source" of the

information. This so-called "public disclosure bar" is designed to weed out "parasitic" actions from those brought by whistleblowers with true inside knowledge of fraud. The classic example of a parasitic action is one brought by someone who has read a newspaper story about fraud.

The Ninth Circuit in *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121 (2015), clarified the requirements for a relator to meet the "original source" of the information exception to the public disclosure jurisdictional bar. The Ninth Circuit joined a majority of other circuits in holding that, to qualify as a relator in a circumstance where an FCA claim has been publicly disclosed before the whistleblower has filed a complaint, the whistle-blower does not need to allege – let alone meet and overcome – the "hand in the public disclosure" requirement. Stated differently, *Hartpence* allows a whistleblower who is the first to file a FCA claim regarding a violation that has been publicly disclosed, to pursue claims in federal court without having to grapple with the judicially-imposed "hand in the public disclosure" doctrine. By removing this requirement, the Ninth Circuit removed a key barrier to *qui tam* claimants in the Ninth Circuit.

B. Relators' Qualification as Original Sources.

Relators Hascoet and Desbois in their revised TAC (Doc. 84) satisfactorily allege they obtained the information underlying their allegations in the Third Amended Complaint via their work for Defendants; they are insider "original sources," as that term is used in the context of the FCA and the CFCA. They plead that: (a) they had direct, firsthand, and independent knowledge information on which the allegations of false claims herein are based, and they obtained such knowledge entirely through their own labors and their jobs with Safran Group, S.A., entities, unmediated by anything else; (b) they obtained their knowledge about Defendants' false claims through their own labors unmediated by anything else; (c) they rely entirely on information received because of their work on compliance issues for entities within Safran Group, S.A. Relators collaborated with one another in the analysis and presentation of such information. *See* TAC ¶¶ 5-8; Declaration of Vincent Hascoet in Opposition to Motion to Dismiss; and Declaration of Philippe Pacaud Desbois in Opposition to Motion to Dismiss.

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Relator Philippe Pacaud Desbois was a high-level employee of Safran Group, S.A., for seven years, from November, 2007, to September 2014. Within "Safran – Aerospace, Defence, Security," Desbois served as Chief Financial Officer Russia ("Delegue Finance Russie"), over ten legal structures with 500 to 600 employees and annual turnover of $500 million. Desbois led the full scope of finance function in all Safran's entities in Russia, including four production sites and a joint venture; he supported the mother companies of the subsidiaries in strategic aspects for Russia; he deployed a shared service center for support functions (Finance, HR, IT and Administration); and he restructured the group of companies for tax optimization. Desbois later served as Chief Executive Officer of Morpho Russia ("Morpho Rus"). In such security division, Desbois handled the acquisition and integration of a new company, he supervised manufacturing and supply chain activities, and he had a close working relationship with Administration. He simultaneously was Safran's country delegate for finance in Russia for several years, until mid-2014. In his role as the CEO of Morpho Russia, Relator Desbois occupied a position of strategic importance. Desbois accordingly, in his capacity of strategic importance as CEO of Morpho Russia, became informed of the July 2, 2008, Technology License Agreement between Sagem Sécurité SA ("Sagem") and Papillon ZAO. Debois, as CEO of Morpho Russia, was provided documentation and oral reports in the course of business, reflecting the source and marketing of technology for Defendants' fingerprint identification products, and regarding a policy and concerted effort by Defendants to conceal the source of such technology from American government entities and NATO, together with an agreement in restraint of trade between Defendants and the Russian corporation Papillon ZAO to divide up the world market in terms of geographic regions. In Desbois' capacity as the CEO of Morpho Russia, Desbois was informed of the license contract with Papillon; because Desbois felt he had to compete with Papillon in some markets, he was explained the full story of Morpho's relationship with Papillon; Desbois was told, in the ordinary course of business, that Papillon is an unofficial partner with Morpho and that Morpho accordingly should not compete with Papillon. *See* TAC ¶ 6.

Relator Hascoet, from July 23, 2012, through May 31, 2014, served in Moscow, Russia, as Deputy Director of the Russian branch of PowerJet, a joint venture of Snecma and NPO

Saturn. Incident to his work with PowerJet, Relator Hascoet became familiar with myriad areas of widespread serious and material noncompliance, most of which he raised in detail in a comprehensive report to PowerJet management in Moscow and Snecma management at Snecma Siège in Paris. These areas included, but were not limited to, myriad acts of bribery, unlawful gifts, bogus transactions, tax evasion, and false certifications of compliance with laws. As Branch Manager of PowerJet, Relator Hascoet, like Relator Desbois, was also in charge of an ongoing relationship with the Russian administration (taxes, pension fund, etc.), carrying the exact same penal responsibilities as borne by Relator Desbois had as the CEO of Morpho Russia. Further, Relator Hascoet, in the same manner as Relator Desbois, held such responsibilities jointly with Hascoet's Chief Accountant. Following Mr. Hascoet's complaints and reports about these compliance issues, his employment was terminated. Because of Relator Hascoet's comprehensive internal compliance work, he and Relator Desbois and Relator Hascoet, in the course of business, engaged in extensive professional communications with one another regarding compliance issues, including especially the areas of noncompliance jointly alleged by Relators in this *qui tam* action. Desbois and Hascoet also closely collaborated in regard to communicating with the U.S. Securities & Exchange Commission ("SEC") regarding Defendants' serious issues of noncompliance. *See* TAC ¶ 7.

From several months preceding the filing of this *qui tam* lawsuit forward, Relators regularly and meticulously monitored news media reports, in American, French, Russian, and other European news media, in English language, French language, and Russian language, in regard to any pre-lawsuit news media reports of Defendants' conduct relative to Morpho fingerprint identification systems. Prior to the filing of this *qui tam* action, there was absolutely no public disclosure whatsoever – via any news story, via any website, via any court or administrative filing, or via or any other means – of the false claims pled herein prior to the filing of this *qui tam* action. TAC ¶ 8. Defendants' argument to the contrary is absolutely false, is an exercise in smoke and mirrors, and is a blatant and shameful attempt by Defendants to mislead the Court.

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VI. FRAUDULENT CONCEALMENT INCIDENT TO DEFENDANTS' SALES TO SUBSIDIARIES, CONTRACTORS, AND INTERMEDIARIES ARE PLED AND ACTIONABLE.

Defendants imply they deserve a "Get Out of Jail Free" card because their sales to the U.S. and the State of California were via subsidiaries and other intermediaries who received the government monies. (Def. Brf., 12:16-13:4, f.4.) Defendants' reliance upon the Declaration of Yves Charvin (Doc. 85-2) and the Declaration of Stephane Abrial (Doc. 85-3) is disingenuous, since the testimony of Chavin and Abrial is conclusionary and lacks foundation. See Declaration of Vincent Hascoet and Philippe Pacaud Desbois, filed therewith. This argument by Defendants is naive, is a throw-back to the pre-FERA days, and simply does not fly in the post-FERA era. FERA in 2009 dispelled for once and for all any doubt about the application of the FCA to indirect sales to the government, through other entities (subsidiaries, subcontractors, or third parties) receiving government funds for a defendant's products or services. Defendants Morpho and Safran are not insulated from liability because they sold their products – and their untruth about country of origin – to subsidiaries and other intermediaries that actually received the government funds.

The TAC pleads in detail that Defendants made sales through subsidiaries.. TAC ¶¶ 9-13. Further, the TAC further sets forth in excruciating detail that Defendants made sales through their subsidiaries Morpho Trak and Morpho Trust to defense contractor Lockheed Martin, who in turn sold Defendants' equipment to the government, in return for taxpayer dollars. TAC ¶¶ 23-29. It is not the province of this court to ignore FERA and rule as if the FCA and CFCA are applicable only to direct sales and have no application to sales done through subsidiaries and subcontractors.

VII. DEFENDANTS' ARGUMENT THAT RELATORS' THIRD AMENDED COMPLAINT FAILS TO ADEQUATELY ALLEGE SCIENTER IS BASELESS.

Relators' Third Amended Complaint is replete with allegations regarding scienter. The TAC expressly pleads that "[m]anagerial employees of the of Safran Defendants, in doing the

acts and things described in this Complaint, were acting within the course and scope of their respective agencies and/or employment, with the knowledge, consent, and direction of top management of Safran, S.A." TAC ¶ 9(f). In addition, the TAC asserts that "each Safran Defendant worked at the direction of Safran, S.A., and each other Safran Defendant, to injure the United States and the State of California." TAC ¶ 9(g). Further, the TAC specifically pleads that DOJ Security Requirements obligated the Defendants and their agents to disclose their use of Papillon ZOE as a subcontractor supplying algorithms for Defendants' fingerprint identification products, which disclosure the Safran Defendants "wilfully" and "knowingly" did not make (TAC ¶ 29(g)-(h). The TAC further alleges that U.S. contracts contain a certification by the contracting Safran entity that it had required all subcontractors to adhere to all security requirements of the contracts, which certification by Robert A. Eckel, the contracting executive for the contracting Safran entity, was "knowingly false." TAC ¶ 29(b) The TAC pleads an outright "agreement" by Defendants, with Papillon ZOE, to divide up the world market, in violation of the Sherman Antitrust Act (15 U.S.C. §§ 1-7) and all other U.S. antitrust laws prohibiting activities that restrict interstate commerce and competition in the marketplace. TAC ¶¶ 31-32. Finally, the TAC pleads that Defendants' management "knowingly" engaged in the conduct constituting each and every alleged violation of the FCA and the CFCA. TAC ¶¶ 39, 43, 47, and 50.

VIII. DEFENDANTS' ARGUMENT THAT U.S. CUSTOMS RULINGS INSULATE DEFENDANTS FROM LIABILITY FOR FRAUDULENT CONCEALMENT OF COUNTRY OF ORIGIN IS INCORRECT, WHERE SUCH ARGUMENT RELIES ON RULINGS REGARDING SOFTWARE ONLY *PARTLY* CREATED IN A NON-DESIGNATED COUNTRY.

Relators' allege that one of the false claims made by Defendants is a certification of compliance with The Trade Agreements Act of 1979, *supra*. TAC ¶ 34 (a)-(c). In general, a product is TAA compliant if it is made in the United States or a "Designated Country"as set forth in the "Designated Countries" list set forth in FAR 25.003. The Russian Federation is *not* on

such "Designated Countries" list, and at no time during the time pertinent to this litigation was the Russian Federation on such list.

Here Defendants rely primarily on a Customs Ruling that deals with *partial* creation in a country that is not a "Designated Country," rather than *complete* creation. There is a *huge* difference., such that such Customs Ruling is not controlling.

CONCLUSION

Defendants' supporting papers are more important for what they *don not* say than what they *say*:

Defendants produce ZERO evidence of pre-lawsuit public disclosure of Relators' alleged country-of-origin false claim, of their claim of false certification of antitrust laws compliance, and of their claim of compliance with The Trade Agreements Act.

Defendants produce ZERO evidence that Relators, in their high-level management and compliance positions within Safran, were not in a position to have firsthand knowledge of the enormous act of deception practiced by Safran in regard to the country of origin of their fingerprint identification technology.

Defendants produce ZERO evidence that they truly do not understand the false claim that Relators make against them in regard to Defendants' lie about country of origin of Defendants' fingerprint identification representation.

Defendants produce ZERO law to support their contention that the False Claims Act, as amended by FERA, does not apply to Defendants' indirect sales to the United States and the State of California, through subsidiaries, contractors, and other intermediaries who are recipients of government funds.

Defendants argue ZERO specifics as to what is missing in regard to the "who, what, when, where, and how" test for Rule 9(b) compliance.

Defendants have successfully blocked discovery – and have otherwise successfully stonewalled this case – long enough.

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It is unfair to Relators, to the Court of Appeals, and, least of all, to federal and state taxpayers, to kick this case up to the 9th Circuit to correct prejudicial errors that Defendants urge the district court to make, as if re-writing the FCA.

For the foregoing reasons, Relators respectfully implore the district court to deny Defendants' motion and issue a new case management order permitting discovery to begin, establishing a new trial date and other new deadlines.

Dated: June 9, 2017

Respectfully submitted,

BARTLEY LAW OFFICES
ATTORNEYS FOR RELATORS
VINCENT HASCOET AND
PHILIPPE PACAUD DESBOIS

By: _____
Daniel Robert Bartley

PROOF OF SERVICE

I declare I am employed in the County of Santa Clara, State of California, by Bartley Law Offices, 1999 South Bascom Avenue, Suite 700, Campbell, CA 95008-2205. I certify that I am over the age of 18.

I hereby certify that on today's date, I electronically filed the foregoing **"RELATORS' POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS RELATORS' THIRD AMENDED COMPLAINT PURSUANT TO FRCP 12(b)(1) AND 12(b)(6)"** with the Clerk of the United States District Court for the Northern District of California by using the District Court's CM/ECF system. I certify that all the counsel listed below are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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I declare under penalty of perjury, under the laws of the United States and the State of Califomia, that the foregoing is true and correct and that this declaration was executed on this 9th day of June, 2017, in the City of Hollister, San Benito County, California.

/s/Daniel R. Bartley

Daniel R. Bartley